



Act Now! New California Proposition 65 Warnings Requirements Are Here

JANUARY 2025

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The California Office of Environmental Health Hazard Assessment (OEHHA) recently finalized proposed changes to the regulations that provide optional language for Proposition 65 warnings that, if used, cannot be challenged in any enforcement action. Although optional, the failure to use the regulatory language approved by OEHHA has triggered litigation in the past, such that use of the approved language is a critical step in reducing the risk of being the target of an enforcement action.

Under the new regulations, a Proposition 65 warning will now require the identification of at least one listed Proposition 65 chemical for which the warning is being provided. Historically, businesses could choose from a “long-form” warning that would name a specific chemical, and a “short-form” warning that did not. Now, both versions of the optional warning language authored by OEHHA require identification of at least one chemical from the Proposition 65 list. The new regulations do not change the requirements for use of the long-form warning, but businesses that have been using the short-form warning will need to update all product labels and Internet listings on which it is being used. Because of the long lead time for marketing teams to design and implement label and advertising changes, now is the time to act.

While the new regulations became effective on January 1, 2025, they have a three-year implementation period to allow businesses to update labels using the short-form warning. Businesses may continue using the current short-form warnings for products manufactured before January 1, 2028, with an unlimited sell-through period. For products manufactured after January 1, 2028, businesses must adhere to the new short-form language to benefit from the regulatory safe-harbor protection.

The Safe Drinking Water and Toxic Enforcement Act of 1986, commonly known as Proposition 65, prohibits businesses with ten or more employees from “knowingly and intentionally” exposing Californians to chemicals that are “known to the state of California to cause cancer or reproductive toxicity” without first providing them a “clear and reasonable warning” about the exposure. Chemicals that are “known to the state of California to cause cancer or reproductive toxicity” are compiled by OEHHA on the Proposition 65 List. There are more than 1,000 chemicals on this list as of the date of publication of this Client Alert.

Proposition 65 does not prohibit the use of any specific chemical, nor does it account for the dose-response relationship or other principles of toxicology related to actual risk of disease. Rather, it is a pure right-to-know statute, which requires the use of warnings to promote understanding about the use of chemicals. Plaintiffs seeking to enforce Proposition 65 can recover civil penalties of up to \$2,500 per day for each violation, along with their attorneys' fees and costs if they prevail at trial.

The only way to safeguard against a Proposition 65 claim is to either ensure that your product does not contain one of the chemicals on the Proposition 65 list, or to provide a Proposition 65 compliant warning about the presence of the chemical. Importantly, a compliant warning need only be one that is "clear and reasonable" under the circumstances of use; no specific language is required. Nonetheless, OEHHA has for decades published regulations which define specific language that can be used and that is, as a matter of law, "clear and reasonable."

In 2018, OEHHA issued regulations that expanded the options for warnings approved by regulation, including the adoption of standard long-form and short-form warnings that businesses can choose from based on their individual needs or available "real estate" on a product label. The standard language for both the long and short-form warnings required identification of the "endpoint(s)" for which the warning was being given (i.e., cancer, reproductive toxicity, or both). However, the long-form warning required the specific naming of at least one chemical for each endpoint covered by the warning. Further, the 2018 regulations required product listings on the Internet and in printed catalogues use the same warning that is used on the product label. As a result, most of our clients opted to use the short-form warning.

The difference between the old and new short-form safe-harbor warning language is shown below for a hypothetical exposure to Bisphenol A (BPA), which is listed solely for the reproductive toxicity endpoint:

Old Short-Form Warning Language

? WARNING: Reproductive Harm — www.P65Warnings.ca.gov

New Short-Form Warning Language (two options are authorized)

? WARNING: Risk of reproductive harm from exposure to Bisphenol A. See — www.P65Warnings.ca.gov

or

? WARNING: Can expose you to Bisphenol A, a reproductive toxicant. See www.P65Warnings.ca.gov

With the new regulations effective January 1, 2025, all business that use a short-form warning will need to change their product labels to comply with the new safe-harbor requirements, as well as any Internet or catalogue listings for those products. The warnings must be updated to identify at least one chemical for which the warning is being provided.

Although the new regulation gives businesses until January 1, 2028, to update their warnings, businesses who currently rely on short-form warnings should act promptly to update their warnings. This is particularly important for any food producers using the old short-form warning language, since the language of the new regulation makes it explicit that a short-form warning is allowed on food.

Label review for compliance with the new Proposition 65 regulation also provides a good opportunity for businesses to review the regulatory compliance status of all labels and Internet product listings.

Additional Information

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